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No.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

SAVE THE BAY, INC.,

Petitioner,

v.

U.S. CORPS OF ENGINEERS, *et al.*,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

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RESPONSE AND BRIEF IN OPPOSITION FOR RESPONDENT, E. I. DU PONT DE NEMOURS AND COMPANY

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TABLE OF CONTENTS

	Page
THE OPINION BELOW	1
JURISDICTION	2
QUESTIONS PRESENTED	2
STATUTES INVOLVED	3
COUNTERSTATEMENT OF THE CASE	4
SUMMARY OF THE ARGUMENT	9
REASONS FOR DENYING THE WRIT	10
I. THE COURT OF APPEALS CORRECTLY AFFIRMED THE FINDING OF THE UNITED STATES DISTRICT COURT THAT THE CORPS OF ENGINEERS ON THE BASIS OF AN ENVIRONMENTAL ASSESSMENT CONDUCTED PURSUANT TO ITS REGULATIONS PROMULGATED TO IMPLEMENT ITS RESPONSIBILITIES UNDER NEPA ACTED REASONABLY AND OBJECTIVELY ON A REVIEWABLE ENVIRONMENTAL RECORD IN ISSUING AN EFFLUENT OUTFALL LINE CONSTRUCTION PERMIT	10
II. THE COURT OF APPEALS PROPERLY DETERMINED THAT NEPA DOES NOT IMPOSE UPON THE CORPS OF ENGINEERS THE OBLIGATION TO PREPARE AN EIS WHERE A NPDES PERMIT HAS BEEN ISSUED UNDER THE FWPCA	14
III. THE COURT OF APPEALS PROPERLY DETERMINED THAT THE CORPS' ISSUANCE OF A DREDGE AND FILL PERMIT FOR THE CONSTRUCTION OF AN OUTFALL LINE, WHICH IS INCIDENTAL AND NONESSENTIAL TO RESPONDENT'S PRIVATE ACTIVITIES, DID NOT CONSTITUTE A MAJOR FEDERAL ACTION SIGNIFICANTLY AFFECTING THE QUALITY OF THE HUMAN ENVIRONMENT.	17
IV. THE ISSUES PRESENTED ON THE PETITION FOR CERTIORARI HAVE BEEN RENDERED MOOT BY VIRTUE OF THE FACT THAT CONSTRUCTION OF THE OUTFALL LINE WAS COMPLETED IN 1978 AND THE DU PONT PLANT HAS BEEN IN OPERATION SINCE AUGUST OF 1979.	21
CONCLUSION	22
CERTIFICATE OF SERVICE	23
APPENDIX	1a
○ Opinion Below	

TABLE OF AUTHORITIES

CASES:	Page
Atlanta Coalition, Etc. v. *Atlanta Regional Commission*, 599 F.2d 1333 (5th Cir. 1979)	19
Biderman v. *Morton*, 497 F.2d 1141 (2nd Cir. 1974)	20
Citizens for Clean Air, Inc. v. *U.S. Corps of Engineers, et al.*, 349 F. Supp. 696 (S.D. N.Y. 1972)	18
Citizens to Preserve Overton Park v. *Volpe*, 401 U.S. 402, 91 S.Ct. 814, 28 L.Ed.2d 136 (1971)	13
Davis v. *Coleman*, 521 F.2d 661 (9th Cir. 1975)	13
Florida Wildlife Federation v. *Goldschmidt*, 611 F.2d 547 (5th Cir. 1980)	8
Gage v. *United States Atomic Energy Comm.*, 479 F.2d 1214 (D.C. Cir. 1973)	20
Kings County Economic Dev. Ass'n. v. *Hardin*, 478 F.2d 478 (9th Cir. 1973)	20
Mahelona v. *Hawaiian Electric Co., Inc.*, 418 F.Supp. 1328 (D. Ha. 1976)	16, 19
Minnesota Public Interest Group v. *Butz*, 498 F.2d 1314 (8th Cir. 1973)	13
New England Coalition v. *U.S. Nuclear, Etc.*, 582 F.2d 87 (1st Cir. 1978)	16
Port of Astoria v. *Hodel*, 595 F.2d 467 (9th Cir. 1979)	19
Save our Ten Acres v. *Kreger*, 472 F.2d 463 (5th Cir. 1973)	13
Save the Bay, Inc., et. al. v. *Mississippi Air and Water Pollution Control Commission*, 341 So.2d 98 (Miss. 1976)	5
Save the Bay v. *Mississippi Air and Water Pollution Control Commission, Environmental Protection Agency, Douglas M. Costle, Administrator of the EPA, and the United States of America*, (S.D. Miss., Civil No. 577-0240-(N), decided August 20, 1977)	6
Save the Bay v. *Mississippi Air and Water Pollution Control Commission, et. al.*, (5th Cir., No. 77-3214)	6
Save the Bay v. *Train*, 556 F.2d 1282 (5th Cir. 1977)	5

Table of Authorities Continued

	Page
Strycker's Bay Neighborhood Council v. *Karlen*, 444 U.S. 223, 100 S.Ct. 497; 62 L.Ed.2d 433 (1980)	13
Vermont Yankee Nuclear Power Corp. v. *NRDC*, 435 U.S. 519, 98 S.Ct. 1197, 55 L.Ed.2d 460 (1978)	14
Wyoming Outdoor Coordinating Council v. *Butz*, 484 F.2d 1244 (10th Cir. 1973)	13
STATUTES:	
Rivers and Harbors Appropriation Act of 1899 33 U.S.C. 401	1
Federal Water Pollution Control Act	
33 U.S.C. 1251-1376	1, 5
33 U.S.C. 1371 (c) (1)—(2)	8
33 U.S.C. 1371(c) (2) (A)—(B)	3, 15
National Environmental Policy Act of 1969	
42 U.S.C. §4321 *et seq.*	2
42 U.S.C. §4332(2) (c)	3, 8, 10, 11
REGULATIONS:	
33 C.F.R. 209.410 *et seq.*	11
33 C.F.R. 209.410 (d) (2) (ii)	11
40 C.F.R. 1500.6	18
MISCELLANEOUS:	
Legislative History of the Water Pollution Control Act Amendments of 1972, 93d Cong. 1st Sess. at p. 239	16

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RESPONDENT, E. I. DU PONT DE NEMOURS AND COMPANY BRIEF IN OPPOSITION

The Respondent, E. I. du Pont de Nemours and Company (Du Pont), respectfully requests that this Court deny the Petition for Writ of Certiorari, seeking review of the Fifth Circuit's opinion in this case. That opinion is reported at *610* F. 2d *322*.

OPINION BELOW

The United States Court of Appeals for the Fifth Circuit affirmed the judgment of the United States District Court for Southern Mississippi, which granted summary judgment to Defendants (Respondents) on Plaintiff's (Petitioner's) request for (1) an injunction against construction of a pipeline permitted by the U.S. Corps of Engineers under 33 USC 401 and 33 USC 1251, and (2) a declaratory judgment that

the Corps prepare an environmental impact statement (EIS).

JURISDICTION

The opinion affirming the trial court's judgment was rendered January 24, 1980. Petition for Rehearing was denied March 17, 1980. Stay of the Mandate pending this review was entered April 16, 1980. Jurisdiction of this Court rests on 28 USC 1254.

QUESTIONS PRESENTED

1. Whether the Circuit Court of Appeals was correct in affirming the finding of the U.S. District Court that the U.S. Corps of Engineers (Corps), on the basis of an environmental assessment conducted pursuant to its regulations promulgated to implement its responsibilities under the National Environmental Policy Act of 1969, 42 USC §4321 *et seq.* (NEPA), acted reasonably and objectively on a reviewable environmental record in issuing an effluent outfall line construction permit?

2. Whether NEPA imposes upon a federal agency the obligation to prepare an EIS on the effects of an effluent discharge permitted under a National Pollutant Discharge Elimination System (NPDES) permit issued under the Federal Water Pollution Control Act (FWPCA)?

3. Whether the Court of Appeals correctly determined that issuance of a dredge and fill permit for the construction of an outfall line did not constitute a major federal action significantly affecting the quality of the human environment since respondent's private activities were incidentally and unessentially related to the permit to construct?

4. Whether the issue of the construction and use of the outfall line is now moot since construction was completed in

1978 and the plant has been in operation since August of 1979?

STATUTES INVOLVED

42 USC 4332(2)(c)

"The Congress authorizes and directs that to the fullest extent possible . . .

All agencies of the Federal Government shall:

(c) Include in every recommendation or report on proposals for legislation and other major federal actions significantly affecting the quality of the human environment a detailed statement (EIS) by the responsible official on:

(i) The environmental impact of the proposed action,

(ii) Any adverse and environmental effects which cannot be avoided should the proposal be implemented,

(iii) Alternatives to the proposed action,

(iv) The relationship between local short-term uses of man's environment and the maintenance and enhancement of long-term productivity, and

(v) Any irreversible and irretrievable commitments of resources which would be involved in the proposed action should it be implemented. . . ."

33 USC 1371(c)(2)

"Nothing in the National Environmental Policy Act of 1969 shall be deemed to—

(A) authorize any Federal agency authorized to license or permit the conduct of any activity which may result in the discharge of a pollutant into the navigable waters to review any effluent limitation or other requirement established pursuant to this Act or the adequacy of any certification under section 401 of this Act; or

(B) authorize any such agency to impose, as a condition precedent to the issuance of any license or permit, any effluent limitation other than any such limitation pursuant to this Act."

COUNTERSTATEMENT OF THE CASE

This case involves the construction of an outfall line from a Du Pont titanium dioxide manufacturing plant to Bay of St. Louis. To construct the outfall line, Du Pont first had to obtain a permit from the Corps. In order to discharge treated effluent through the outfall line, it was required to obtain an NPDES permit pursuant to the FWPCA.

In 1975 Du Pont began construction of its plant at De Lisle, Mississippi. It was completed in the summer of 1979 and has been in operation since August 1979. Pursuant to public notice, and in most instances after public hearing, Du Pont obtained permits or approvals from state and federal agencies associated with construction and operation of the plant. Various aspects of the plant's impact on the environment were considered and environmental control measures approved including:

- control and quality of treated water effluent approved by the Mississippi Air and Water Pollution Control Commission (MAWPCC) and the Environmental Protection Agency (EPA).
- control of air emissions by MAWPCC.
- control of solid waste by the Mississippi State Department of Health.
- control of the impact on wetlands by the Mississippi Marine Resources Council.
- permission to drill a disposal deep well by the Mississippi Oil and Gas Board.
- control of effluent disposed of into the deep well by MAWPCC.

- permission to install an effluent outfall line into navigable waters by the U.S. Corps of Engineers.

It is this last permit that provides the basis for this lawsuit.[1] Du Pont applied for the permit here in question on November 21, 1974. It sought permission to install an outfall line over a short distance of marshland and approximately 2,200 feet into the Bay of St. Louis via a ditch in the bottom of the bay.

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[1] In several separate but related cases, Petitioner has endeavored to stop the effluent discharge authorized by the NPDES permit and the construction and operation of a railroad line servicing the plant. This litigation provides a background against which this Petition should be examined.

In *Save the Bay* v. *Administrator of the Environmental Protection Agency*, 556 F.2d 1282 (5th Cir., 1977), Save the Bay (STB), in an original proceeding in the Court of Appeals, attacked the NPDES permit by challenging the EPA's designation authority pursuant to the FWPCA, 33 USC §1251-1376. In particular, STB charged that the EPA acted improperly by failing to revoke Mississippi's state NPDES permit. Briefly stated, that Court held that STB must first exhaust its administrative remedies before review was available in federal courts of appeals as to whether EPA improperly failed to revoke Mississippi's state NPDES permit program. In addition, the Court found that jurisdiction over EPA's failure to veto an NPDES permit was only proper in federal district court and that in reviewing veto cases the district court may only examine (1) whether the permit contains a violation of federal guidelines the agency has failed to consider, and (2) whether unlawful factors have tainted the agency's exercise of discretion.

In *Save the Bay, Inc., et al.*, v. *Mississippi Air and Water Pollution Control Commission*, 341 So.2d 98 (Miss. 1976), STB was successful in establishing its right to a hearing to challenge the MAWPCC permits. In accordance with that holding, the Mississippi Supreme Court remanded the case for further proceedings, which were held in the summer and fall of 1977. At these hearings, STB presented evidence concerning the effluent discharge. Based on a review of this evidence, the MAWPCC, on December 13, 1977, revised its original NPDES permit to incorporate a number of STB's suggestions. STB's petition to review the revised permit in Mississippi Chancery Court, Harrison County, No. 71954, was dismissed with prejudice on July 17, 1978.

The application was processed in accordance with the Corps' regulations, particularly those regulations promulgated to implement the Corps' NEPA responsibilities. The Corps solicited comments from federal and state agencies and from the public. A public hearing was held on June 19, 1975, and an official transcript of all comments, written and oral, was prepared. No agency expressed any concern over environmental impact, and several expressed the view that there would be no significant impact. Various public groups and private citizens commented in support of the proposed action or in opposition to it.

Those who opposed, including the Petitioners, directed their concern not to the outfall line but to the effluent that would flow through it and be discharged into the Bay.

In *Save the Bay* v. *Mississippi Air and Water Pollution Control Commission, Environmental Protection Agency, Douglas M. Costle, Administrator of the EPA and the United States of America* (S.D. Miss; Civil No. S77-0240-(N), decided August 20, 1977), STB sought, among other things: (1) cancellation of the MAWPCC hearings being conducted pursuant to the Mississippi Supreme Court order, (2) an injunction directing the MAWPCC to enjoin Du Pont from further construction on the plant, (3) cancellation of MAWPCC's permits, (4) designation of EPA as the appropriate agent to conduct further hearings, (5) preparation of an EIS by the EPA, (6) a declaratory judgment on the issues raised in the pleadings, (7) a writ of mandamus ordering EPA to withdraw MAWPCC's authority, and (8) a prayer for monetary relief. On August 20, 1977, all of these claims were dismissed. In relevant part the district court held (1) that EPA had no authority to cancel the permits, (2) that there was no authority to halt construction on the plant, and (3) that EPA did not have to prepare an impact statement, because the NPDES permit was issued under State authority and further because EPA is exempt from preparing impact statements under Section 511(a) of the FWPCA, 33 USC 1371(a). [Because regulations have not been promulgated for titanium dioxide it is not considered a new point source, triggering the necessity for an EIS.] STB's appeal in that case was dismissed by the Fifth Circuit on June 22, 1978, for lack of prosecution. *Save the Bay* v. *Mississippi Air and Water Pollution Control Commission et al.* (5th Cir. No. 77-3214).

On July 17, 1975, the Corps issued a detailed environmental assessment. It determined that the permitted activity would have no significant impact on the environment and deferred to the EPA and MAWPCC authorities' expertise regarding the quality of effluent to be discharged and the conclusions of those agencies that the quality controls imposed by the NPDES discharge permit guaranteed no adverse impact on the water quality of Bay of St. Louis.

On August 26, 1975 the permit issued. The permit authorized construction of the outfall line. The permit contained a condition that it *did not authorize* any discharge via the pipeline to the Bay of St. Louis. Thus, such discharge was to be controlled by NPDES permit as required by the appropriate permitting agency, in this case MAWPCC.

One year after the permit issued, on August 5, 1976, Petitioners brought this suit against the Corps and Du Pont in the U.S. District Court for Southern Mississippi. Petitioners charged the Corps with violating several federal laws and asked that Du Pont be enjoined from constructing the line. The court dismissed several of Petitioners' claims, none of which are at issue here. Ultimately, the questions before the court were (a) did the Corps violate NEPA in failing to prepare an EIS, (b) should outfall line construction be enjoined until an EIS was prepared, and (c) should a preliminary injunction against construction issue pending final judgment?

Though plant construction was under way, Du Pont stipulated it would not commence construction of the outfall line until the court ruled on the merits.

On December 9, 1977, the magistrate granted summary judgment in favor of the Corps and Du Pont. Petitioners appealed *but sought no injunction against outfall line*

construction pending appeal in either the trial or appellate court, though it knew Du Pont was proceeding.[2]

In early 1978 STB appealed only to have the appeal dismissed on the technical ground that final judgment must be entered by the judge—not his magistrate.

Upon execution of judgment by the judge, Petitioners again appealed to the Fifth Circuit but still failed to request interlocutory relief pending review.

In January 1980 the Fifth Circuit affirmed. The court rejected the appellant's contention that the Corps' determination was unreasonable, citing *Save Our Ten Acres* v. *Kreger,* 472 F.2d 463 (5th Cir. 1973), noting that it was clear that the Corps had testimony, evidence and comments from individuals and governmental agencies which could lead it to reasonably conclude that an EIS would not be necessary. Moreover, the court rejected the appellant's contention that the grant of the outfall line construction permit constituted a "major federal action significantly affecting the quality of the human environment" under 42 USC §4332(2)(c) which would have required the preparation of an EIS. Acknowledging that the FWPCA, 33 USC §1371(c)(1) prohibits the issuance of an NPDES permit from being deemed a major federal action within the meaning of NEPA and that §102(2)(c) of that Act prohibits federal agencies, under

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[2] Petitioner's continued prosecution of the instant matter in light of the failure to seek a stay against the pipeline construction is highly incongruous. The clear purpose of the lawsuit was to require the United States Corps of Engineers to prepare an EIS prior to the construction and operation of the Du Pont plant. Petitioner is fully aware that said plant has been fully constructed and in operation since August of 1979. Petitioner's failure to take any interlocutory action in an attempt to halt construction during the pendency of the appeal renders the issues sought to be raised herein as moot and the appeal should be dismissed on that ground. *Florida Wildlife Federation* v. *Goldschmidt,* 611 F.2d 547 (5th Cir. 1980).

guidance of NEPA, from reviewing any effluent limitation as a condition precedent to the issuance of a license, the court was unable to see how the granting of the outfall line construction permit, after issuance of a valid NPDES permit, could be considered a major federal action. The court further examined and relied upon guidelines issued by the Council on Environmental Quality which underscore the proposition that a private project does not become a major federal action because of some incidental federal involvement. It thereupon concluded, on the unique and peculiar facts of this case, that some greater involvement than is present herein must be present in order for there to exist major federal action.

SUMMARY OF THE ARGUMENT

The case at bar involves a local action which has no significant impact upon the environment. Appellant's unsupported allegations concerning the massive environmental impact of the Du Pont plant are in stark contrast to the record of this matter which reveals the uniformly positive support and clearance it has obtained from appropriate state and federal environmental agencies. Construction of the effluent outfall line from the plant to Bay of St. Louis was approved only after a detailed environmental assessment by the Corps pursuant to its regulations promulgated to implement NEPA.

In deciding the case, the Fifth Circuit reviewed the voluminous administrative record below and relied upon factual bases for its decision. Its resolution of the issues herein is fully consistent with existing statutory and case law and sets forth no novel legal theories.

The opinion of the lower court correctly notes that the Corps of Engineers properly complied with the applicable procedural requirements set forth in NEPA by performing an environmental assessment before determining that this action, i.e., issuing the permit, did not constitute a "major

federal action" significantly affecting the quality of the human environment and therefore did not require the preparation of an EIS.

Furthermore, the Fifth Circuit's decision in the case at bar appropriately recognized the clearly established mandate of the FWPCA that the issuance of a NPDES permit may not be deemed a "major federal action" and its further expression that federal agencies (under guidance of NEPA) may not review any effluent limitation under a NPDES permit or impose any effluent limitation as a condition precedent to the issuance of a license.

Additionally, the Fifth Circuit found that the lower court properly determined on the unique factual record of the case at bar that incidental and unessential federal involvement in a private project does not "federalize" the action so as to necessitate the preparation of an EIS.

Ultimate completion of the construction of the outfall line and commencement of plant operations in August of 1979 viewed in light of the appellant's failure to seek a stay of the District Court judgment renders this petition moot and not appropriate for consideration herein.

REASONS FOR DENYING THE WRIT

I. The Court Of Appeals Correctly Affirmed The Finding Of The United States District Court That The Corps Of Engineers On The Basis Of An Environmental Assessment Conducted Pursuant To Its Regulations Promulgated To Implement Its Responsibilities Under NEPA Acted Reasonably And Objectively On A Reviewable Environmental Record In Issuing An Effluent Outfall Line Construction Permit.

Pursuant to the mandate of NEPA and as expressed in §102(2)(c) of that Act, 42 USC §4332(2)(c), a federal agency has the duty to prepare a detailed EIS in every ma-

jor federal action significantly affecting the quality of the human environment.

In order to determine which of its actions as a federal agency triggers the provisions of §102(2)(c), the Corps promulgated regulations implementing NEPA. These regulations, 33 CFR 209.410 *et seq.*, require the District Engineer to make an environmental assessment about a project before either granting a regulatory permit or withholding it pending preparation of the EIS. They further require the District Engineer to consider comments received from other federal agencies as well as state and local agencies and the public. Consequently, the Corps is able to make an informed threshold decision on the applicability of NEPA's mandate.

In the case at bar, it is clear that the Corps meticulously complied with every detail of its statutory and regulatory responsibilities by issuing a detailed environmental assessment pursuant to 33 CFR 209.410(d)(2)(ii). It determined that the permitted activity would have no significant impact upon the environment and deferred to the EPA and MAWPCC authorities' expertise regarding the quality of the effluent to be discharged and the conclusions of those agencies that the quality controls imposed by the NPDES discharge permit guaranteed no adverse impact on the water quality of Bay of St. Louis. While there is little doubt that NEPA establishes a clear mandate to all federal agencies to give careful and informed consideration to environmental values in their decision-making process, the record of this case clearly reveals a wide ranging, good faith assessment by the Corps of Engineers of the potential environmental impact of its action. The Corps issued a public notice of the instant permit application, seeking the input of the appropriate federal, state and local agencies, numerous environmental groups, various interested universities, business groups, private organizations and individuals. Among

the groups included in this dissemination were: the Environmental Protection Agency, the Fish and Wildlife Service, the National Oceanic and Atmospheric Administration, Mississippi's Marine Resources Council and Air and Water Pollution Control Commission, Mississippi's State Clearinghouse for Federal Programs, the Mobile Wildlife Conservation Center, the Sierra Club and approximately 110 other groups, agencies and individuals.

The response from appropriate state and federal agencies was unanimously positive. The EPA informed the Corps that it had no objections to the issuance of the Du Pont permit. The Fish and Wildlife Service stated that the proposed project would have no adverse effect on fish and wildlife resources and expressed no objection to the issuance of the permit. The Mississippi Marine Resources Council notified the Corps that the project would have no significant adverse impact on coastal wetlands, and the Mississippi State Clearinghouse for Federal Programs informed the Corps that the action was consistent with present state goals and policies. Only the National Marine Fisheries Service, in a form response, failed to grant unqualified approval of the project, based upon the fact that it had not been able to investigate the plan. In fact, no federal, state or local agency with expertise on these matters expressed any objection to the instant project.

In order to collect additional data for its determination of whether the project constituted a major federal action, the Corps conducted a public hearing at which time opponents and proponents of the project were given the opportunity to express their views. Only after an exhaustive review of the extensive administrative record, a detailed examination of five different environmental criteria, the comments of various groups and individuals, did the District Engineer issue the permit to dredge and fill. It is important to note that this

is not a case where important aspects of environmental impact were not considered. Quite the contrary, the activity permitted by the Corps received exhaustive review after which the Corps concluded that there would be no permanent or significant adverse environmental effects.

The Fifth Circuit correctly determined that the standard for review of an agency determination that an EIS need not be prepared is whether such determination is reasonable, made objectively and in good faith on a reviewable environmental record.[3] *Save Our Ten Acres* v. *Kreger, supra.* See also *Davis* v. *Coleman,* 521 F.2d 661 (9th Cir. 1975); *Minnesota Public Interest Group* v. *Butz,* 498 F.2d 1314 (8th Cir. 1973); *Wyoming Outdoor Coordinating Council* v. *Butz,* 484 F.2d 1244 (10th Cir. 1973).

Rejecting the Appellant's contentions that the Corps' determination was unreasonable, the Fifth Circuit recounted the extensive evidence before the Corps and the Corps' independent environmental assessment of the proposed action and held that the Corps had testimony, evidence and comments from individuals and governmental agencies which could lead it to reasonably conclude that an EIS was not necessary. This rule of reason approach is fully consistent with the guidelines for review which have been set forth by this Court in *Citizens to Preserve Overton Park* v. *Volpe,* 401 U.S. 402, 416, 91 S.Ct. 814, 828, 28 L.Ed. 2d 136, 153 (1971). Most recently, in *Strycker's Bay Neighborhood Council* v. *Karlen,* 444 U.S. 223, 100 S.Ct. 497, 500, 62 L.Ed. 2d 433, 437-438 (1980), this Court has reemphasized the fact that while NEPA has established significant substantive

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[3] Petitioner readily concedes that the standard applied by the Fifth Circuit is legally appropriate. They nevertheless seek, using the improper vehicle of a Petition for Certiorari, to have this Court review a factual determination which has previously undergone extensive administrative and judicial scrutiny.

goals for the nation, it imposes upon agencies duties that are *essentially procedural* and that once an agency has made a decision subject to NEPA's procedural requirements, the only role for the Court is to insure that the agency has considered the environmental consequences. In short, it should not interject itself within the area of discretion of the executive as to the choice of action to be taken. See also *Vermont Yankee Nuclear Power Corp.* v. *NRDC*, 435 U.S. 519, 554-555, 98 S.Ct. 1197, 1217, 55 L.Ed. 2d 460, 486 (1978).

Finally, it is evident that what the petitioners seek in the instant writ—further review of the reasonableness of the Corps' determination constitutes yet another *factual review* of a matter which has previously undergone extensive administrative inquiry in addition to two levels of judicial investigation. The voluminous factual record upon which the Corps made its determination has been exhaustively reviewed. It is respectfully submitted that such application falls outside the purview of those matters reviewable within the context of a Writ of Certiorari and should consequently be denied.

II. The Court Of Appeals Properly Determined That NEPA Does Not Impose Upon The Corps Of Engineers The Obligation To Prepare An EIS Where A NPDES Permit Has Been Issued Under The FWPCA.

The Fifth Circuit's decision affirming the Corps' determination limiting its review to construction and operation of the outfall line and excluding the environmental consequences of the effluent discharged therefrom was premised upon the interrelationship between NEPA and the FWPCA. More particularly, the Fifth Circuit decision is consistent with the clearly established FWPCA mandates that the issuance of a NPDES permit may not be deemed a "major fed

eral action" and that Federal agencies (under guidance of NEPA) may not review any effluent limitation.

Section 511(c)(2)(A)-(B) of the Federal Water Pollution Control Act, 33 USC 1371(c)(2)(A)-(B), expressly states that NEPA may not be used by a Federal agency as a basis to review any effluent limitation established pursuant to the FWPCA or impose any effluent limitation in connection with any permit or license other than such limitation established pursuant to the FWPCA. Moreover, the Act expressly acknowledges that no action taken by the Administrator pursuant to this Act shall be deemed a major Federal action significantly affecting the quality of the human environment. That section provides, in pertinent part, that:

> (c)(1)
>
> "[n]o action of the Administrator taken pursuant to this chapter shall be deemed a major Federal action so affecting the quality of the human environment within the meaning of the National Environmental Policy Act of 1969; and
>
> (c)(2)
>
> "Nothing in the National Environmental Policy Act of 1969 shall be deemed to
>
> "(A) authorize any Federal agency authorized to license or permit the conduct of any activity which may result in the discharge of a pollutant into the navigable waters to review any effluent limitation or other requirement established pursuant to this chapter. . .or
>
> "(B) authorize any such agency to impose, as a condition precedent to the issuance of any license or permit, any effluent limitation other than any such limitation established pursuant to this chapter."

The legislative history of this section clearly reveals the Congressional intent that NEPA not be used to impose stricter limitations than those imposed by the State or EPA NPDES permit:

> "[n]othing in the National Environmental Policy Act may be construed as the basis for the establishment by other Federal agencies of more stringent controls on the discharge of pollutants other than those provided under this Act nor are such agencies authorized to review or alter effluent limitations issued under this Act."

Legislative History of the Water Pollution Control Act Amendments of 1972, 93d Cong. 1st Sess. at p. 239

This position has received broad judicial approval among the circuits. In *New England Coalition* v. *U.S. Nuclear, Etc.*, 582 F.2d 87 (1st Cir. 1978), the First Circuit has specifically determined that under Section 511(c)(2)(A) the Nuclear Regulatory Commission, in fulfilling its NEPA obligation, was not required to make an independent inquiry into the EPA's findings on the effect the Seabrook nuclear plant would have on the aquatic environment. To that effect, the court noted:

> "The NRC argues, and we agree, that it can properly limit its concern to deciding whether permits should be issued given the aquatic impact as determined by the EPA." *Id* at 98.

And in *Mahelona* v. *Hawaiian Electric Co., Inc.*, 418 F. Supp. 1328, 1336 (D.Ha. 1976), a case upon which Appellant has placed heavy reliance, the same result was reached when the court noted that to conform with the FWPCA, an EIS *may not reassess the water quality considerations* which had already been addressed by EPA. *Mahelona, supra* at 1336.

It is therefore clear that the court's determination that the instant project did not constitute a "major federal ac-

tion" was premised upon its proper analysis of the interrelationship between the FWPCA and NEPA. The Fifth Circuit's determination that the Corps properly limited the scope of its environmental assessment on water quality to the environmental consequences which would result from the construction and operation of the outfall line and that the environmental consequences of the effluent was a factor to be excluded from their consideration was fully consistent with the express mandate of the FWPCA. The FWPCA precludes the very type of duplicative review by federal agencies which Petitioner seeks herein. Appellant's assertions to the contrary, the environmental consequences which may be associated with the effluent *have received and will continue to receive* extensive environmental scrutiny by the State of Mississippi upon whom the NPDES responsibility on water quality has been duly conferred, and by the EPA.

III. The Court Of Appeals Properly Determined That The Corps' Issuance Of A Dredge And Fill Permit For The Construction Of An Outfall Line, Which Is Incidental And Nonessential To Respondent's Private Activities, Did Not Constitute A Major Federal Action Significantly Affecting The Quality Of The Human Environment.

The STB decision represents another in a long line of NEPA determinations with respect to an evaluation of the question of whether a particular project constitutes a major federal action significantly affecting the quality of the human environment. In reaching its determination herein, the Court of Appeals simply applied the facts of the case at bar to the applicable NEPA law. The court's determination emphasized and relied upon the guidelines issued by the CEQ which suggest that a private project does not become a "major federal action" merely because of some incidental federal involvement. Furthermore, the Fifth Circuit carefully examined the protracted factual record of this matter and, based upon the particular facts established herein, properly

determined that Appellant failed to establish a sufficient nexus between the Corps' permit and the construction of the entire Du Pont plant so as to "federalize" the project. The soundness of this determination is evident.

Under the guidelines issued by the Council on Environmental Quality, 40 CFR 1500.6(c), an agency need only prepare an impact statement on an otherwise private action when the agency has control over the "action-causing" impact. Those guidelines state that:

> The identification of major actions significantly affecting the environment is the responsibility of each federal agency, to be carried against the background of its own particular operations. The action must be (1) "major" action, (2) which is a "Federal" action, (3) which has a "significant" effect, and (4) which involves the "quality of the human environment". The words "major" and "significantly" are intended to imply thresholds of importance and impact that must be met before a statement is required. *The action causing the impact must also be one where there is sufficient Federal control and responsibility to constitute Federal action.* 40 CFR 1500.6(c) (emphasis supplied)

Appellant's contentions notwithstanding, a private project does not automatically become a "major federal action" merely on the basis of some tangential federal involvement.

The Court of Appeals carefully reviewed the cases relied upon by STB in support of its position that the issuance of the outfall permit by the Corps somehow served to "federalize" the project. The Court's rejection of appellant's argument was not premised upon its disagreement with the general principles set forth in those cases, but rather upon a determination that the facts in those cases were clearly distinguishable from the case before it. Since the case of *Citizen's for Clean Air, Inc.* v. *U.S. Corps of Engineers et al.*, 349 F.Supp. 696 (S.D. N.Y. 1972) preceded the FWPCA

amendments of 1972, the court correctly noted that the decision was no longer supportive of the proposition advanced by STB. With respect to *Port of Astoria* v. *Hodel*, 595 F.2d 467 (9th Cir. 1979), the court contrasted the incidental federal involvement of the case at bar with the long term contractual relationship between a federal agency and a private corporation in which the proposed private manufacturing plant was entirely dependent upon electrical power to be supplied by the federal agency. Finally, the court correctly observed appellant's misplaced reliance upon *Mahelona* v. *Hawaiian Electric Co., Inc., supra*, where the problem was not that the Corps failed to examine the effects of the electrical generating plant, but rather failed to review the environmental consequences of the very activity the Corps permitted, i.e., a wastewater discharge facility.

A recent case arising out of the Fifth Circuit contains a well reasoned discussion of the interrelationship between private and federal action. In *Atlanta Coalition, Etc.* v. *Atlanta Regional Comm'n*, 599 F.2d 1333 (5th Cir. 1979), the court, commenting upon the relationship between the United States Department of Transportation's planning responsibilities and Atlanta's local regional development plan within the context of the applicability of NEPA to private action, observed that while it would not quarrel with the proposition that in some circumstances, "federal involvement [could be] *so massive, so pervasive* that the acts of the state are in reality federal actions," the mere funding of a particular development program by the federal agency fell far short of the requisite involvement to "federalize" the activity. *Atlanta Coalition, Etc., supra*, at p. 1346 (emphasis supplied).

The Court of Appeals' determination that the grant of an outfall line construction permit, after issuance of a valid NPDES permit, did not constitute sufficient involvement to

be characterized as "major federal action" was entirely appropriate. That decision was a narrow one and based entirely on the unique factual circumstances set forth in this record which clearly reveal the *de minimis* environmental impact associated with the construction and operation of the outfall line.

Moreover, appellant's suggestion that a private project automatically becomes a major federal action merely because of some tangential federal involvement loses much of its force in light of the fact that the requisite federal action is only present when federal approval is a necessary condition precedent without which the private action could not take place. *Biderman* v. *Morton*, 497 F.2d 1141, 1147-1148 (2nd Cir. 1974). See also *Kings County Economic Dev. Ass'n.* v. *Hardin*, 478 F.2d 478, 480-481 (9th Cir. 1973); *Gage* v. *United States Atomic Energy Comm.*, 479 F.2d 1214, 1220 (D.C. Cir. 1973). The Fifth Circuit has correctly noted that utilization of the outfall structure was never a condition precedent to the plant's operation and that at least two alternative waste disposal techniques were available. One alternative method involved deep well injection and the other would have resulted in discharge into the natural nonnavigable drainage swale and then into the Bay of St. Louis. Since neither of these options would have required a permit from the Corps, the requisite nexus between the federal agency and the private action is missing.

In sum, it is evident that the Fifth Circuit's determination that the Corps' determination that the instant project did not constitute a "major federal action" significantly affecting the quality of the human environment was correctly decided on the peculiar and unique factual record set forth below. The court's decision was premised upon its concurrence with the determination of the Corps, which was performed in conformity with all statutory and regulatory

criteria and guidance, and its careful examination and reliance upon CEQ guidelines on this very point.

IV. The Issues Presented In The Petition For Certiorari Have Been Rendered Moot By Virtue Of The Fact That Construction Of The Outfall Line Was Completed In 1978 And The Du Pont Plant Has Been In Operation Since August Of 1979.

Petitioner has repeatedly maintained that the courts below erred in not finding that the grant of the outfall line construction permit was a "major federal action significantly affecting the quality of the human environment" and therefore requiring the preparation of an EIS. However, continued prosecution of the instant matter in light of the failure to seek a stay against the outfall line construction is highly incongruous.

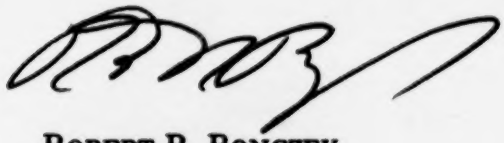
The clear purpose of the lawsuit was to require the Corps to prepare an EIS prior to the construction and operation of the Du Pont plant. When the instant action was brought, Du Pont stipulated that it would not commence outfall line construction until the District Court ruled on the merits of this case. After summary judgment was granted in favor of the Corps and Du Pont, construction on the outfall line was begun. While Petitioners filed an appeal of the lower court determination, they failed to seek an injunction against outfall line construction pending appeal to either the trial or appellate court, though they knew Du Pont was proceeding.

Construction of the outfall line was completed in October of 1978 and the plant has been fully constructed and in operation since August of 1979. Petitioner's failure to take any interlocutory action in an attempt to halt construction during the pendency of the appeal and more importantly, the actual completion of the activity of concern renders the issues sought to be raised herein as moot.

CONCLUSION

In sum, the lower court determination was a narrow one and based entirely on the unique and particular factual circumstances set forth in this record. The court's decision is not in conflict with any previous decision of this court or any decision of another circuit and does not establish any new or novel legal theories or precedents. The instant application requests that this court reexamine what is essentially a factual matter which has already received extensive regulatory agency and judicial evaluation. For the foregoing reasons, the Petition for a Writ of Certiorari filed by STB presents no issues warranting further review and should be denied.

Respectfully submitted,



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September 4, 1980

CERTIFICATE OF SERVICE

I, Robert R. Bonczek, Legal Department, E. I. du Pont de Nemours and Company, attorney for Respondent, Du Pont, do hereby certify that I have this day mailed a copy, postage prepaid, of the foregoing Response to Petition for Writ of Certiorari to:

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90-5-1-7-491

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This, the 4th day of September, 1980.

Robert R. Bonczek

APPENDIX

APPENDIX

UNITED STATES COURT OF APPEALS

FIFTH CIRCUIT

No. 79-1432

SAVE THE BAY, INC.,
Plaintiff-Appellant,

v.

THE UNITED STATES CORPS OF ENGINEERS, UNITED STATES ARMY, COLONEL DRAKE WILSON, and E.I. DU PONT DE NEMOURS AND COMPANY,
Defendants-Appellees.

Appeal from the United States District Court
for the Southern District of Mississippi

Jan. 24, 1980.

Before BROWN, TJOFLAT and GARZA, Circuit Judges.

GARZA, Circuit Judge:

Appellant appeals from refusal of the United States Magistrate, acting on behalf of the District Court by consent of the parties, to require the United States Corps of Engineers to prepare an Environmental Impact Statement (EIS) as provided for under the National Environmental Policy Act of 1969 (NEPA), 42 U.S.C. §4321 *et seq.* Appellants argue the Court below erred in concluding that the environmental assessment by the district engineer was reasonable and based on substantial evidence, that the activity involved was not a major federal action significantly affecting the quality of the human environment, and that the Corps of Engineers was not required to consider the environmental consequences of the entire project but only the effects of the installation and maintenance of a twenty-four inch outfall pipeline. Appellees argue on appeal that Appellants have no

standing to challenge the actions of the Corps of Engineers. For the reasons stated below, we affirm the ruling of the United States Magistrate.

FACTS

At the time this litigation began, the defendant, E.I. Du Pont De Nemours & Co., Inc., proposed to construct and operate a massive titanium dioxide manufacturing facility in Delisle, Mississippi. Pursuant to this plan, Du Pont sought necessary authorization and permits from appropriate state and federal agencies.

On November 21, 1974, Du Pont sought authorization from the defendant, Army Corps of Engineers, to install a twenty-four inch diameter effluent line into the marshlands and Bay of St. Louis. The effluent line would carry approximately two million gallons per day of industrial wastewater and discharge it into the Bay of St. Louis. The line would be approximately 2,200 feet in length extending into the Bay and construction would require removal of 610 cubic yards of dredged material from the Bay.

On February 3, 1975, the Mississippi Air and Water Pollution Control Commission, acting pursuant to authority delegated to it by the Environmental Protection Agency, issued a National Pollutant Discharge Elimination System (NPDES) permit to Du Pont allowing discharge of the wastewater in accordance with the conditions of the permit.

Following solicitation of comments from federal, state and local agencies concerning the proposed pipeline construction permit, the Corps of Engineers announced a public hearing would be held on June 19, 1975, to answer any questions concerning issuing of the pipeline construction permit. In keeping with the Corps' prior determination that only the construction of the pipeline was subject to their regulation,

the public notice for the hearing was limited to the installation of the twenty-four inch diameter pipeline and made no mention of consideration of other aspects of the Du Pont plant in the issuance of its permit. On June 19, 1975 the hearing was held and all proponents and opponents were allowed to express their views. The proponents consisted mostly of governmental or business organizations and generally testified as to the favorable economic impact the plant would have. The opponents, consisting mostly of ecological and recreational organizations, testified generally that a potential danger to marine life existed and that an Environmental Impact Statement was necessary.

On July 17, 1975, Colonel Drake Wilson, District Engineer for the Mobile Corps of Engineers, issued a Statement of Findings assessing the impact the proposed activity would have on the environment. The Corps determined there would be no adverse effect on air quality and that water quality would be only temporarily affected. The findings also noted the issuance of the NPDES permit and that the Environmental Protection Agency had no objection to the issuance of the Corps' permit. The statement, also taking into consideration the determinations of the Mississippi Marine Resources Council and the Gulf Coast Research Laboratory, found there would be no significant adverse effect on land use, visual aesthetics, wildlife, sealife, vegetation, or historical interests. Based on the administrative record, Colonel Wilson directed that the permit be issued. The permit only authorized building the pipeline and was subject to several conditions, one of which required that Du Pont have a proper NPDES permit governing the effluent discharge.

The Plaintiff, Save the Bay, Inc., brought suit pursuant to the National Environmental Policy Act (NEPA) against the United States Army Corps of Engineers, the United States Army, Colonel Drake Wilson, Mobile District Office of the

Corps of Engineers, and Du Pont seeking declaratory and injunctive relief and monetary damages. The case was referred to the United States Magistrate by the District Judge and thereafter the defendant's Motions for Summary Judgment were granted and judgment was entered December 16, 1977 dismissing the complaint with prejudice.

STANDING

Save the Bay's complaint alleges that it is a nonprofit corporation organized under the laws of the State of Mississippi; that its membership is primarily composed of numerous full-time and part-time residents of Harrison and Hancock Counties in the State of Mississippi; and that its members will be adversely affected economically, aesthetically and environmentally.

Appellee Du Pont urges on appeal that Save the Bay has failed to establish standing under §10 of the Administrative Procedures Act, 5 U.S.C. § 702. Specifically, Du Pont argues that under *Sierra Club* v. *Morton*, 405 U.S. 727, 92 S.Ct. 1361, 31 L.Ed.2d 636 (1972) and *United States* v. *SCRAP*, 412 U.S. 669, 93 S.Ct. 2405, 37 L.Ed.2d 254 (1973), Save the Bay must allege that its members "use" the area and that the proposed federal action will significantly affect their "use". Du Pont's reliance on *Sierra Club* v. *Morton, supra*, is misplaced. Here, the Plaintiff has alleged economic, aesthetic and environmental injury to its members and clearly has gone beyond mere general allegations of grievance on behalf of the public interest. Du Pont's argument, that failure to specifically allege "usage" of the geographic area is fatal to Plaintiff's standing, is without merit. An obvious inference of the English language is that residents of a geographical area "use" that geographical area. An allegation of residence coupled with an allegation of injury caused by federal action affecting the area of that residence clearly

demonstrates that the party seeking review is among those injured. We fail to see how the acts of camping, hiking, fishing or sightseeing, in a particular geographic location, held sufficient for standing in *United States* v. *SCRAP, supra,* can be considered more relevant for purposes of standing than can the act of residing in a particular geographic location.

REASONABLENESS OF THE CORPS' DECISION

The Court below noted that the standard for review of an agency determination that an Environmental Impact Statement need not be prepared is whether such determination is reasonable. This standard was set forth by this Court in *Save Our Ten Acres* v. *Kreger,* 472 F.2d 463 (5th Cir. 1973). If the determination is reasonable and made objectively and in good faith on a reviewable environmental record, the determination must be upheld. The Court below found that the environmental assessment prepared by the Corps completely and fully addressed the possible environmental consequences, that the assessment was based on substantial evidence, and that Corps complied with appropriate federal statutes and regulations. Appellants contend that the Corps' determination was unreasonable. They argue that the testimony and evidence offered in opposition to the building of the pipeline and plant should compel the conclusion that an EIS is required. The Appellants further argue that the Corps abdicated its responsibilities by failing to conduct independent studies and by considering the evaluations of other governmental agencies concerning the pipeline's potential adverse effects.

We do not agree with Appellant's contentions. Without detailing every point and counter-point of evidence before the Corps, it is clear that the Corps had testimony, evidence and comments from individuals and governmental agencies

which could lead it to reasonably conclude that an EIS would not be necessary. The Corps received and reviewed comments from several governmental agencies[1] as well as from quasi-governmental and business organizations. With little exception, all comments from governmental agencies indicated there would be no significant adverse impact on the environment. We cannot agree with Appellant that consulting with these agencies was improper. The National Environmental Policy Act, 42 U.S.C. § 4332(2)(C) requires that federal agencies consult with other agencies whose area of expertise is superior to their own. Of course, this should not be understood as allowing the Corps to base their determination solely on the comments of other agencies. Perhaps the most basic requirement of NEPA is that all federal agencies make an *independent* environmental assessment of the proposed action. The Court below correctly recognized this in distinguishing this case from *Mahelona* v. *Hawaiian Electric Company,* 418 F.Supp. 1328 (D. Hawaii 1976) wherein the Corps of Engineers erroneously considered the advisements of the EPA as determinative and consequently failed to independently determine whether or not the proposed action would have a significant impact on the human environment. For these reasons we hold the Corps' decision was not unreasonable.

A MAJOR FEDERAL ACTION?

Appellants contend the court below erred in not finding the grant of the pipeline construction permit was a "major Federal action significantly affecting the quality of the hu-

[1] Among those agencies were the following: the Environmental Protection Agency, the Department of Interior, Fish and Wildlife Service, the Department of Commerce, the National Oceanic and Atmospheric Administration, the Mississippi Marine Resources Council, the Mississippi Air and Water Pollution Control Commission, and the Mississippi State Clearing House for Federal Programs.

man environment", under 42 U.S.C. §4332(2)(C), and therefore requiring preparation of an EIS. In furtherance of this contention they argue that granting almost any Federal permit to this massive multimillion dollar manufacturing plant should trigger the obligations of NEPA.

The Court below held that the provisions of NEPA must be read in context of other language in the Federal Water Pollution Control Act (FWPCA), 33 U.S.C. §1251 *et seq.*, which places control of water pollution caused by discharges of effluents in the hands of the states and the EPA. *United States* v. *SCRAP, supra.* The court went on to hold, citing *Sierra Club* v. *Hodel,* 544 F.2d 1036 (9th Cir. 1979) and *Port of Astoria* v. *Hodel,* 8 ERC 1156, aff'd 595 F.2d 467 (9th Cir. 1979), that the issuance of the Corps' permit was not a sufficient nexus between the Corps and construction of the Du Pont plant to make the Corps a partner in such construction and thereby "federalize" the construction of the Du Pont plant. In other words, the granting of the pipeline permit by the Corps was not a "major Federal action" within the meaning of NEPA.

In addition to the Court's holding, it should also be noted that FWPCA, 33 U.S.C. §1371(c)(1),[2] ordinarily prohibits the issuance of a NPDES permit from being deemed a major Federal action significantly affecting the quality of the human environment within the meaning of NEPA. Furthermore, § (c)(2) prohibits Federal agencies, under guidance of NEPA, from reviewing any effluent limitation under a NPDES permit or from imposing any effluent limitation as a condition precedent to issuance of a license.

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[2] 33 U.S.C. §1371(c)(1) and (2) provides as follows: (c)(1) Except for the provision of Federal financial assistance for the purpose of assisting the construction of publicly owned treatment works as authorized by section 1281 of this title, and the issuance of a permit under section 1342 of this title for the discharge of any pollutant by a new source as defined in

The decision of the Court below in no way held that the Corps was precluded from preparing an EIS because of FWPCA, but instead held that the Corps' determination, of whether or not issuance of the construction permit was a "major Federal action", was limited to construction and operation of the pipeline itself and correctly held that the environmental consequences of the effluent was a factor to be excluded from their consideration.

In reaching our conclusion on this point we are not unmindful of the impact that building of this massive manufacturing plant will have on the people of Harrison and Hancock Counties, but the requirements of NEPA do not reach private acts—only "major Federal actions." We fail to see how granting of the pipeline construction permit, after issuance of a valid NPDES permit, can be considered a major Federal action. An examination of the guidelines issued by the Council on Environmental Quality, 40 C.F.R. 1500.6(c), indicates that a private project does not become a "major Federal action" merely because of some incidental federal involvement. In this case, the pipeline itself was not a necessity for operation of the plant. At least one alternative method of discharge, not requiring any Corps permit, was

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section 1316 of this title, no action of the Administrator taken pursuant to this chapter shall be deemed a major Federal action significantly affecting the quality of the human environment within the meaning of the National Environmental Policy Act of 1969 (83 Stat. 852); and (2) Nothing in the National Environmental Policy Act of 1969 (83 Stat. 852) shall be deemed to—

(A) authorize any Federal agency authorized to license or permit the conduct of any activity which may result in the discharge of a pollutant into the navigable waters to review any effluent limitation or other requirement established pursuant to this chapter or the adequacy of any certification under section 1341 of this title, or

(B) authorize any such agency to impose, as a condition precedent to the issuance of any license or permit, any effluent limitation other than any such limitation established purusant to this chapter.

available to Du Pont. We are not saying that the requisite Federal action must be a condition precedent to private action in order for preparation of an EIS to be required. But we do hold that in order for there to exist "major Federal action" some greater involvement, than is present in the case at hand, must exist.

THE PIPELINE OR THE WHOLE PLANT?

Appellant's most virgorously argued point on appeal and perhaps the point which would control the outcome of this case contests the Corps looking only to the environmental consequences of the pipeline construction and maintenance instead of considering the entire Du Pont project in its decision on whether or not to prepare an EIS.[3] Appellants assert that narrowing the scope of inquiry to the pipeline construction alone is the "blinder" approach which should be rejected by this Court. By analogy they compare the Du Pont facility to a living organism which at one end eats chlorine gas and at the other end excretes hydrocloric acid, iron, chromium, zinc, and other nastiness to the tune of 2,000,000 gallons per day. Their argument is that but for the permit there would be no pipeline; without the pipeline there would be no excretion; without the ability to excrete the plant would suffocate in its own waste. They argue that the permit "enables" the plant to exist and therefore the entire plant should be taken into consideration in whether or not the pipeline construction permit should be issued. In support of this "Enablement Theory", appellants cite *Port of Astoria* v. *Hodel, supra, Mahelona* v. *Hawaiian Electric Company, Inc., supra,* and *Citizens for Clean Air, Inc. et al.* v. *United States Army Corps of Engineers et al.,* 349 F.Supp. 696 (S.D.N.Y.1972).

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[3] We express no opinion as to the proper scope and extent of coverage of an EIS should one have been necessary.

Upon review of these cases, this Court does not disagree with their reasoning but the circumstances of those cases are clearly distinguishable from those before us. The case of *Citizens for Clean Air* preceded the FWPCA Amendments of 1972 and therefore is no longer supportive of the proposition advanced here. In *Port of Astoria* there existed a long-term contractual relationship between a Federal agency and a private corporation in which the proposed private manufacturing plant was entirely dependent upon electrical power to be supplied by the Federal agency. In *Mahelona* the problem was not that the Corps failed to examine the effects of the electrical generating plant, but rather failed to review the consequences of its own construction permit allowing a wastewater discharge facility. In short, the results of these cases do not compel the conclusion which the Appellants desire. Absent facts or circumstances which are not present here, we decline to hold that NEPA required the Corps as a matter of law to consider the entire Du Pont facility in determining whether or not an EIS was necessary.

AFFIRMED.